United Nations AT/DEC/1146

Administrative Tribunal

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ADMINISTRATIVE T[illegible]AL

Judgement No. 1146

Case No.1243: FERNANDEZ Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza President; Mr Mayer Gabay Vice-President; Mr. Omer Youssif Bireedo;

Whereas at the request of Helen Razi Fernandez, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, extended to 3 March 2002 the time limit for the filing of an application with the Tribunal.

Whereas, on 15 February 2002 September 1998, the Applicant filed an Application, requesting the Tribunal,inter alia:

"...

(c) *to decide* to hold oral proceedings on the present application in accordance with Article 8 of its Statute and Chapter IV of its Rules;

8. On the merits ...:

(a) *to rescind* the decision of the Executive Director maintaining the Applicant's summary dismissal;

(b) *to find and rule* that the Joint [Disciplinary Committee (JDC)] erred in matters of law and fact in reaching its conclusions that summary dismissal was proportionate to the misconduct found to exist;

(c) *to order* Applicant's reinstatement in service with effect from 12 September 2000;

(d) *to award* the Applicant appropriate and adequate compensation with interest to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant for denial of due process and violation of her rights under the Staff Regulations and Rules;

(e) *to fix* pursuant to Article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three year's net base pay with interest from 12 September 2000, in view of the special circumstances of the case;

(f) *to award* the Applicant ... the sum of $7,500.00 in legal fees and $500 in expenses and disbursements."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 June 2002 and periodically thereafter until 31 August 2002.

Whereas the Respondent filed his Answer on 16 July 2002;

Whereas the Applicant filed Written Observations on 27 November 2002;

Whereas, on 23 October, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined UNICEF as a Clerk-Typist (G-2), Programme Development and Planning Division, on 10 November 1980. On 3 July 1983, she was granted a permanent appointment. After a number of extensions and promotions, on 1 February 1998, the Applicant was transferred to the Private Sector Division, Finance and Administration, as Senior Secretary at the GS-5 level. The Applciant separated from service on 11 September 2000.

An ongoing audit of personal telephone usage conducted in the latter months of 1999, disclosed that out of 1,214 telephone calls made using a fax machine authorization code, 82% of the interstate and international calls were made from the Applicant"s telephone extension. On 17 November 1999, the Director, Human Resources of UNICEF notified the Applicant of the disclosures and requested an explanation as to whether the calls were personal and why the fax code was employed by the Applicant instead of her regular assigned code.

In her reply on 26 November 1999, the Applicant explained that the authorization code in question was used for both business and personal calls and that she had assumed that she was using the correct code which had been originally assigned to her by the Telephone Unit as her permanent number. In December 1999,

and in January 2000, the Applicant provided reimbursement for the amounts allegedly owed.

However, by letter dated 3 May 2000 from the Officer-in-Charge Division of Human Resources, the Applicant was notified that she was being charged with unauthorised use of the fax machine authorisation code for personal purposes and for private gain, and failure to reimburse UNICEF for an extended period of eight and a half years, as well as misuse of UNICEF resources and misappropriation of UNICEF funds.

On 18 July 2000, the Applicant submitted her reply to the above referenced charges offering a detailed defense, and explaining her reasons for use of the fax code rather than her personal code and for her neglect in making timely reimbursement for her personal calls.

On 11 September 2000, Ms. Karin Sham Poo, Deputy Executive Director, UNICEF, informed the Applicant of the decision of the Executive Director that she would be summarily dismissed, on the grounds that the Executive Director had concluded that the Applicant's actions constituted conduct not befitting an international civil servant, as well as serious misconduct for which she was to be immediately separated from service in accordance with Staff Regulation 10.2.

On 25 September 2000 and 12 December 2000, the Applicant requested a review by the JDC of the Executive Director's decision.

The JDC adopted its report on 5 September 2001. Its findings and conslusions read, in part, as follows:

> "Even if we give the Appellant the benefit of the doubt and accept that she originally thought she lost her personal authorization in 1993 (...) and later remembered that she lost or forgot it in August 1996 (...), and we accept that the Telecommunications Unit allegedly gave her the fax authorization code as her telephone authorization code, it was decided not to pursue investigation of the Telecommunications Unit's contradictory account of the facts, because it would not explain the following:
>
> 1. The Appellant continued to use her personal code from September 1996 to December 1996 after allegedly being given the fax code as her personal code in September 1996 by the Telecommunications Unit.
>
> 2. The Appellant used both her personal code and the fax code from her own office telephone extension to make personal calls for the period of January 1993 to December 1995.

> 3. The telephone code indicates that the Appellant also used the fax code and her personal telephone code from her own extension for the period of January to December of 1996 as well.
>
> 4. The Appellant stopped using the fax code from her office telephone extension at the end of July 1999, and began using her previously authorized personal code again.
>
> ...
>
> ... [T]here can be no question that the Appellant was aware of the unauthorized use of the fax authorization code to make personal calls, particularly when the Appellant was also using her telephone authorization code simultaneously. This action constitutes misuse and misappropriation of UNICEF funds, and does constitute fraud, by using UNICEF funds for personal gain.
>
> ...
>
> (iv) The Appellant has indicated that the amounts of money involved are small. While the Committee does believe that UNICEF should be clearer about the disciplinary measures, as defined in UN Staff rule 110.3 for cases of misconduct, which UNICEF further clarified in its Human Resources Manual, CF/MN/P.I/15 dated March 1997, it has determined that UNICEF has been consistent in the application of this measure of summary dismissal for all cases of fraud in the past several years. The UN Tribunal has also supported this form of disciplinary measure for a similar case in the recent past.
>
> (e) Therefore the Committee concludes that summary dismissal was proportionate to the misconduct found to exist."

Under cover of a letter dated 17 September 2001, the Executive Director of UNICEF transmitted a copy of the JDC report to the Applicant, and advising her as follows:

> "I have re-examined the decision to summarily dismiss you in light of the Committee's report and have taken note of its conclusion that your summary dismissal was proportionate to the misconduct found to exist. I have also taken note of the Committee's determination that it could find no evidence that there were procedural irregularities, prejudice in the investigation of your case or that due process was not followed in the decision to dismiss you. Therefore, I have decided to accept the Committee's recommendation and to maintain your summary dismissal."

On 5 February 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision to summarily dismiss the Applicant was based on procedural irregularities resulting in a denial of due process and errors of fact and law.

2. The penalty imposed upon the Applicant was disproportionate to the offense.

3. The Respondent arbitrarily discounted extenuating circumstances resulting in an erroneous assessment of the facts.

4. The Applicant's case was subject to undue and unjustifiable delays

5. The Applicant was subjected to stress, humiliation, and mental anxiety as well as damage to her reputation

Whereas the Respondent's principal contentions are:

1. The Secretary-General has broad discretion with regard to disciplinary matters, and this includes determination of what constitutes serious misconduct warranting dismissal. The decision to summarily dismiss the Applicant for failing to meet the requisite standards of integrity, was a valid exercise of that discretionary authority.

2. The Applicant failed to meet the standards of integrity required of staff members as international civil servants and the established facts legally amounted to serious misconduct.

3. The decision of the Secretary-General to summarily dismiss the Applicant was a necessary and valid exercise of his discretion, to ensure that only staff who meet the Charter requirement of the highest standards of integrity are retained for service.

4. The Applicant was accorded due process.

5. The penalty imposed was not disproportionate to the offence.

The Tribunal, having deliberated from 23 October 2003 to 17 November 2003 in New York, now pronounces the following Judgement:

I. The Applicant is appealing the decision of the Executive Director of UNICEF, affirming the JDC's recommendation to separate her from service on the grounds of serious misconduct. The Applicant contends that the penalty of summary dismissal was disproportionate to the alleged offense, the decision of the JDC was arbitrary and unsupported by the evidence, and significant procedural irregularities existed which deprived her of her due process rights.

II. The Applicant joined the UNICEF Programme Development and Planning Division on 10 November 1980, as a Clerk Typist. After a number of extensions and

promotions, she was granted a permanent appointment and transferred to Private Sector Division, Finance and Administration, as a Senior Secretary at the GS-5 level. The Applicant was summarily dismissed for serious misconduct on 12 September 2000.

On 17 November 1999, the Office of Internal Audit advised the Applicant by letter that, following a review, it had been determined that during the period January-July 1999, long distance calls had been placed using the telephone authorization code 4228770, which had been assigned to fax number 326-7449, and that most of these calls had originated from the Applicant's phone extension. The letter also noted that "during the period under review no calls appear to have been made from your extension using your official telephone authorization code 504494". The Applicant replied on 26 November 1999, transmitting payment for calls billed. The amount alleged to be owed was subsequently revised downward and payment of the correct amount was forwarded on 1 December 1999.

On 20 December 1999 the Applicant received a further letter transmitting list of calls made using the fax code. The Applicant replied on 6 January 2000 explaining that after losing her personal authorization code a number of years before, she had spoken by phone to the Chief of the Telecommunications Unit, who had confirmed the fax code number for her use. After deducting allowed amounts, the Applicant confirmed a further amount owed of $467.83 and submitted a check for the balance due.

III. On 3 May 2000, the Officer-in-Charge, DHR, wrote to the Applicant advising her that she was being charged with serious misconduct. On 16 May and 6 June 2000, the Applicant, further to her request, received memoranda transmitting additional records for the periods 1990 through 1996. On 18 July 2000, the Applicant responded to the charges. On 11 September 2000 the Deputy Executive Director wrote to the Applicant advising her that she was being summarily dismissed.

The Applicant requested a review before the JDC and on 5 September 2001, the JDC submitted its report recommending that the Applicant's summary dismissal be upheld. The Executive Director accepted this recommendation.

The JDC report unanimously concluded that the summary dismissal was appropriate and found that

> "even though there are definitely no anomalies in the stories provided by both the Applicant and the Telecommunications Unit regarding the timely provision of telephone bills, delayed payment of telephone bills is not the issue in this case. Neither is the delayed payment of collect call charges. The allegations

> of fraud are solely based on the Applicant knowingly using the fax authorization code to make personal calls from her office telephone number, while having been assigned a telephone authorization code for that purpose."

Additionally, the JDC stated that

> "even if we give the Applicant the benefit of the doubt and accept that she originally thought she lost her personal authorization in 1993 and later remembered that she lost or forgot it in August 1996, and we accept that the Telecommunications Unit allegedly gave her the fax authorization code as her telephone authorization code, it was decided not to pursue investigation of the Telecommunications Unit's contradictory account of the facts, because it would not explain the following:
>
> 1. The Applicant continued to use her personal code from September 1996 to December 1996 after allegedly being given the fax code as her personal code in September 1996 by the Telecommunication Unit.
>
> 2. The Applicant used both her personal code and the fax code from her own office telephone extension to make personal calls for the period of January 1993 to December 1995 and for the period of January to December of 1996.
>
> 3. The Applicant stopped using the fax code from her office telephone extension at the end of July 1999, and began using her previously authorized personal code again."

The JDC went on to conclude that

> "If [the Applicant] was given the fax code as her personal code in September of 1996, she would not have continued to use her previously assigned personal code until the end of the year. By using both codes simultaneously from 1993 to 1996, the Applicant had to be aware that she was using the fax code inappropriately for personal calls, since she was also using the same fax code to send official faxes from the fax machine. The records also show that she had paid for personal telephone calls on her telephone authorization code and so had to be aware that it was assigned to her for that purpose."

IV. The issue, therefore to be determined by the Tribunal is whether the rights of the Applicant were infringed by the decision to summarily dismiss her for misusing UNICEF resources and misappropriating UNICEF funds.

The Applicant claims that neither the report of the JDC nor the Executive Director's decision, were supported by the facts, and, therefore were arbitrary and in violation of due process requirements. She explains her use of the fax authorization code rather than her own personal code for charging her personal calls, as due to carelessness rather than an attempt to avoid charges, asserting that she had been singled out for harsh treatment.

The Respondent argues that the Applicant failed to meet the standards of integrity required of a staff member as international civil servants since the established facts legally

amounted to serious misconduct pursuant to Section 15.4.14 of the Human Resources Manual and Staff Rule 110.4. Moreover, the Respondent states, the decision of the Secretary-General in this case was a valid exercise of his discretion to determine what amounts to serious misconduct warranting dismissal from service in order to ensure that only staff who meet the Charter requirement of the highest standards of integrity are retained for service.

V. The Tribunal has consistently upheld the Secretary-General's power to exercise broad discretion in disciplinary cases, including the right to determine whether a staff member has met required standards of conduct, the right to determine whether certain conduct constitutes "serious misconduct" and the authority to penalize staff members in misconduct cases. In the case of UNICEF, the Tribunal confirms that this authority had been delegated to the Executive Director who is empowered to impose disciplinary measures including summary dismissal for serious misconduct.

VI. The Applicant pleads that her actions do not amount to fraud, and that notwithstanding the alleged gravity of the charges, the penalty imposed on her was unwarranted and disproportionate to the magnitude of the offence. The Respondent in reply, states that UNICEF and its staff are custodians of monies, intended to aid suffering children throughout the world, and therefore are obliged to exercise a fiduciary responsibility in handling UNICEF funds. The Tribunal's competence to review the Secretary-General's discretionary powers (and in this case, the Executive Director of UNICEF) to discipline United Nations staff must be confined to determining whether the disciplinary action at issue was vitiated by prejudicial or extraneous factors, by significant procedural irregularity, or by significant mistakes of fact. (See Judgment No. 1103, *Dilleyta* (2003).) In this connection, the Tribunal generally examines: (i) whether the facts on which the disciplinary measures were based have been established; (ii) whether the established facts legally amount to misconduct or serious misconduct; (iii) whether there has been any substantive irregularity (e.g. omission of facts or consideration of irrelevant facts); (iv) whether there has been any procedural irregularity; (v) whether there was an improper motive or abuse of purpose; (vi) whether the sanction is legal; (vii) whether the sanction imposed was disproportionate to the offence; (viii) and, as in the case of discretionary powers in general, whether there has been arbitrariness. (See Judgment No. 898, *Uggla*, para. II (1998); Judgment No. 941, *Kiwanuka*, para III (1999).)

VII. With respect to the Applicant's contention that the facts do not amount to serious misconduct, the Tribunal can offer no support. With regard to her position that she is a victim of due process failures in a case riddled with procedural irregularities, the Tribunal can also render her no assistance. The Tribunal has consistently held the Applicant to the burden of proving prejudice or other improprieties. (See Judgment No. 1122, *Lopes Braga* (2003).)

The right to due process of law is not merely a statutory privilege to be conferred and applied at will. It is a fundamental right which serves as the cornerstone upon which the legitimacy of any administrative Tribunal must rest. As such, the Tribunal is bound to zealously safeguard it and consequently treat with any claimed infringement of it with the utmost concern.

In the case at hand, the Tribunal can find no instances of gross procedural irregularities or due process violations as alleged by the Applicant. Indeed, the record is replete with evidence of exchanges of substantial and relevant information between the Applicant and various departments of the Organization. The Applicant had been served with detailed charges and copies of the evidence, advised of her rights and granted the opportunity to rebut. The Tribunal would be hard pressed to find any wrongdoing in this area. It is eminently clear that the Applicant was afforded every opportunity to respond to and explain away the allegations of misconduct registered against her. It also appears that the JDC proceedings were conducted in a reasonably fair and impartial manner. The one remaining question posed by the Applicant which warrants a closer look by the Tribunal is the allegation that the Respondent approached OHRM on an ex-parte basis in order to seek advice on UNICEF procedural requirements. The Tribunal does not find this action to be so egregious so as to constitute a violation of due process or a procedural infirmity requiring redress. The Tribunal therefore must conclude that the Applicant has not sustained her burden of proof with respect to this issue.

The Tribunal finds that the Respondent's burden of proof was met and its actions did not fall outside the scope of its broad discretionary powers. Furthermore, it is readily apparent to the Tribunal that the Executive Director of UNICEF carefully examined the JDC's report along with the totality of the circumstances, in affirming that the Applicant should be separated from service for serious misconduct.

VIII. In conclusion, the Tribunal holds that reasonable, responsible and legitimate discretion required by the Staff Regulations and Rules was exercised in concluding that the Applicant had not only engaged in serious misconduct but also failed to meet the

highest standards of conduct expected of an international civil servant. The Tribunal also holds that the Respondent did not violate the Applicant's due process rights by dismissing the Applicant.

IX. For the foregoing reasons, the Tribunal rejects the Application in its entirety.

(*Signatures*)

Julio **Barboza**
President

Mayer **Gabay**
Vice-President

Omer Youssif **Bireedo**
Member

New York, 17 November 2003

Maritza **Struyvenberg**
Executive Secretary